cerning the title to or boundaries of land" in the same class as the controversies named, a writ of error lies to any order or judgment in action of ejectment, although no final judgment has been entered in the cause.

If it were true that prior to the amendment of section 3454 an appeal or writ of error did lie from or to an order or judgment in that class of cases, although there had been no final judgment in the cause, the contention of the petitioners for the rehearing would be clearly right. But prior to the amendment an appeal or writ of error did not lie in any case at law until there had been a final order or judgment in the cause. There was a provision in that section that in any case in chancery wherein there is a decree or order dissolving an injunction or requiring money to be paid, or the possession or title of property to be changed or adjudicating the principles of a cause, there might be an appeal, although no final order or decree had been entered therein. But there was nothing in the section, as construed by this court, which authorized a writ of error in any case at law until there had been a final judgment. See Gillespie *v.* Coleman, 98 Va. 276, 36 S. E. 377, and authorities cited, especially Trevilian *v.* Louisa R. Co., 3 Grat. 326; Hancock *v.* R. & P. R. Co., 3 Grat. 328; Ludlow *v.* City of Norfolk, 87 Va. 319, 12 S. E. 612; Postal Tel. Co. *v.* N. & W. R. Co., 87 Va. 349, 12 S. E. 613; R. & E. R. Co. *v.* Johnson, 99 Va. 282, 38 S. E. 195.

We are of opinion that the language of section 3454, as amended, does not give a party in an action of ejectment the right to have the proceedings in the cause reviewed by this court until a final judgment has been entered in the cause.

The petition to rehear must therefore be denied.

JEREMY IMP. CO. *v.* COMMONWEALTH.

(Supreme Court of Appeals of Virginia. Jan. 24, 1907.)

[56 S. E. 224.]

1. Exceptions, Bill of—Incorporating Evidence—Stenographer's Report.—Immediately following a bill of exceptions setting forth the court's refusal to set aside the verdict was a certificate, signed by the judge under seal: "And the court certifies that the following stenographic report of the evidence made by O., to which report the affidavit of said O. is appended, is all the evidence, including documentary evidence therein referred to, introduced on the trial of this cause, which report is adopted and made a part of the record." Following such certificate was the complete evidence with the affida-

vit mentioned by the court attached. Held that, while it is the better practice for the evidence to be set out in the bill of exceptions before the signature of the judge, failure to do so did not preclude consideration of the evidence; the certification and identification of the evidence by the court being complete.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 21, Exceptions, Bill of, § 14.]

2. Indictment—Filing.—In the case of a presentment by the grand jury, it is not necessary that the record show that the finding was recorded in the circuit court; but it is sufficient in such a case that the presentment be set forth in extenso in the order of the court entered of record and made a part thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, §§ 68, 69.]

3. Eminent Domain—Abatement of Nuisances.—Code 1904, § 1729a, providing for the abatement of public nuisances, does not authorize a taking of private property for a public use, within Const. Va. § 58, forbidding the taking of private property for public use without just compensation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, § 7.]

4. Nuisance—Public Nuisance—Prosecutions.—On a prosecution for the abatement of a public nuisance, the thing or act which is the ground of the prosecution must be shown to be the direct and proximate cause of the nuisance.

5. Same.—It is no defense to a prosecution for the abatement of a public nuisance that it is contributed to by the acts of others over whom defendant has no control, if there should be a nuisance without such contribution.

6. Criminal Law—Trial—Instructions.—Where, on a prosecution for the abatement of a public nuisance consisting of a milldam, there was no evidence tending to show that the health of any one traveling on the public highway was affected by the conditions alleged to have been caused by the existence of the dam, an instruction that, if the dam produced such conditions as caused people passing on the highway to become affected with the certain diseases, the verdict should be for the commonwealth, was erroneous.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1985.]

7. Nuisances—Public Nuisance—Prosecutions—Instruction.—On a prosecution for the abatement of a public nuisance consisting of a milldam, it was error to refuse a requested instruction that a milldam lawfully established is not prima facie a nuisance; Va. Code 1904, § 3868, defining obstructions in a water course constituting a nuisance, having expressly excepted a dam used to work a mill.

8. Same—Evidence—Sufficiency.—On a prosecution for the abate-

ment of a public nuisance, consisting of a milldam, evidence considered, and held insufficient to show that the dam was the proximate cause of the conditions complained of.

Error to Circuit Court, Charlotte County.

Prosecution by the commonwealth against the Jeremy Improvement Company to abate and remove a dam alleged to be a public nuisance. Judgment in favor of the commonwealth, and defendant brings error. Reversed, and remanded for a new trial.

S. A. Anderson, McGuire & Riely, and *W. C. Carrington,* for plaintiff in error.

W. H. Mann, Atty. Gen., for the Commonwealth.

HARRISON, J. It appears that the plaintiff in error is the owner of a mill situated on Roanoke creek, in Charlotte county, at Saxe, a station on the Southern Railway. About three-quarters of a mile above the mill, a dam across the channel of the creek is maintained for the purpose of furnishing water power to the mill. This dam was established, in pursuance of then existing statutes, in the year 1794. One acre of land on the opposite side of the creek was condemned for the construction of an abutment of the dam. The original dam was 75 to 100 yards further down the stream than the present dam, but there is nothing in the record to show that its present location is not within the limits of the one acre which was condemned for its original erection. Its present position was fixed as early as 1876.

This prosecution to abate and remove the dam mentioned, as a public nuisance, was instituted under section 1729a of the Va. Code of 1904. It had its origin in the complaint of five citizens of Charlotte county to the judge of the circuit court of that county. The grand jury summoned in response to this complaint brought in a presentment against the plaintiff in error, charging that the maintenance of the dam was a public nuisance. It is alleged that the dam is about one mile from one public highway, and about half a mile from another, and about one mile from the "Experimental Farm" belonging to the state of Virginia. It is further alleged that the plaintiff in error has unlawfully and injuriously permitted the waters of the Roanoke creek and mill pond to overflow the adjacent land of others, as well as his own, and also the public highway, by reason whereof the land so overflowed was rendered and kept marshy and filled and covered with noxious weeds and putrid vegetation, whereby the air became corrupted and infected, causing malignant fevers, chills, and other loathesome sickness and diseases, to the great damage and common nuisance, not

only of the neighboring citizens, but of all the good citizens of the commonwealth passing along and using said highways or public roads and said Southern Railway, and all of the good citizens of the commonwealth visiting the said Experimental Farm, and also to the great damage, trouble, and inconvenience of all the good citizens of the commonwealth passing along and using the said highway or public road leading from Mossingford to Reese's.

There was a demurrer to this presentment, which was overruled by the circuit court. This action of the circuit court was assigned as error, but the objection was waived at the bar of this court.

The trial resulted in a verdict against the accused, and a judgment thereon imposing a fine of $25, and requiring the sheriff of the county to forthwith cause the dam of the plaintiff in error to be cut down and removed from Roanoke creek. A motion in arrest of judgment, and to set aside the verdict as contrary to the law and evidence, were successively made and overruled; and thereupon the case was brought here for review.

The defendant in error raises the preliminary question that the evidence adduced cannot be considered, because not made a part of the record by a proper bill of exceptions.

This contention is not tenable. Bill of exceptions No. 9 sets forth, under the seal and signature of the judge, the action of the court in refusing to set aside the verdict. Immediately following is this certificate, which is also signed by the judge under seal: "And the court certifies that the following stenographic report of the evidence, made by T. E. Owen, bearing date the 10th day of November, 1905, to which report the affidavit of said Owen is appended, is all the evidence, including documentary evidence therein referred to, including the deed to the Jeremy Improvement Company and the writ of ad quod damnum, introduced upon the trial of this case, which report is adopted here and made a part of the record." Following this certificate is the complete evidence, with the affidavit of the notary mentioned by the court attached.

It is usual, and the better practice, for the evidence to be set out in the bill of exception before the signature of the judge is attached, for thereby all question of identification of the evidence is removed; but the failure to do this is not fatal, where, as in the case before us, the certificate and identification of the evidence by the court is complete, and it is, as here, in effect made part of the bill of exceptions. Leftwich v. Lecanu, 4 Wall. (U. S.) 187, 18 L. Ed. 388.

The point is made by the plaintiff in error that the record

does not show that the finding of the grand jury with respect to the presentment was recorded in the circuit court, and therefore it does not appear that it was a true bill; it being contended that since Cawood's Case, 2 Va. Cas. 527, it has been held that the record in a criminal case must show affirmatively that the indictment was found as a true bill by the grand jury which originated it; that this omission cannot be supplied by presumption or by inference from other recitals in the record; and that the failure to show this by the record will invalidate all subsequent proceedings in the case.

This is true as to an indictment, but it has never been so held with respect to a presentment such as we have in the case at bar. On the contrary, the practice is, when such a presentment is returned, to set forth the substance of the finding in the order of the court, which has always been deemed sufficient. In the case before us the presentment by the grand jury has been set forth in extenso in the order of the court, entered of record, and made a part thereof. This is all that is required in such a case.

It is with hesitation suggested in the petition for a writ of error that section 1729a of the Code, under which this proceeding was instituted, is in conflict with section 58 of the Virginia Constitution, which forbids the taking of private property for public uses without just compensation.

This is a criminal prosecution against the defendant as a wrongdoer for creating and maintaining an alleged public nuisance, which is declared to be injurious to the public health. The abatement of such a nuisance for the public safety comes under the police power of the state, and is not a taking of private property for a public use in the sense contemplated by the Constitution, for which compensation must be allowed.

The evidence shows that the country claimed to be injuriously affected by the existence of the dam extends from the latter a distance of 7 miles above. There is, however, no evidence that the dam caused refluent or back water for that distance. On the contrary, the weight of evidence shows that the dam does not back the water for a greater distance than 700 yards, and all the witnesses who speak upon the point seem to agree that there is no stagnant water in the stream itself, there being a current extending to the dam. It appears that the country above the dam, through which Roanoke creek runs, is naturally low and subject to overflows, resulting in a marshy condition of the adjacent land that renders it practically unfit for cultivation. It also appears that along almost the entire course of the stream about which there is any testimony, varying in extent at different points, there are ponds or pools of water formed in low

places from the natural and periodical overflows, which at certain seasons have no outlet and become stagnant. Most of these pools exist in what was the old bed rock of Roanoke creek, which is lower than the present bed. This old bed was left as the result of a change in the course of the stream made by adjoining landowners between the years 1855 and 1858. It was the theory of the commonwealth, and its evidence was directed to show, that the dam so obstructed the flow of the water in the stream as to cause the constant deposit of sand in the bed, thus gradually lessening the height of the inclosing banks, with the result that overflows upon the adjacent lands were more frequent. But the evidence abundantly shows that many obstructions, other than the dam, existed in the stream and impeded its flow.

In the case of Commonwealth *v.* Webb, 6 Rand. 726, which was a criminal prosecution for a nuisance caused by a milldam which produced stagnation in the water of the stream itself, this court held "that, to constitute a public nuisance, the act done or duty omitted must affect injuriously some thing or right in which the community, as a body politic, have a common interest, and the facts producing this injury and connecting it with such public right or interest must be alleged and proved." In that case the information contained two counts—the first concluding, "To the great damage and common nuisance of all the good citizens of this commonwealth, not only those residing, but also going, returning, passing, and repassing by the neighborhood of the said point," and the second count concluding, "To the common nuisance of all the good citizens of the commonwealth." Upon a demurrer to the information, the court held these averments insufficient, saying that it was necessary to allege and prove that the nuisance charged affected "a public highway, or some other place in which the public have such special interest."

It is well settled that the thing or act which is the ground of the prosecution must be shown to be the direct and proximate cause of the nuisance. State *v.* Rankin, 3 S. C. 438, 16 Am. Rep. 737; State *v.* Holman, 104 N. C. 861, 10 S. E. 758; Missouri *v.* Illinois, 200 U. S. 496, 26 Sup. Ct. 268, 50 L. Ed. 572.

The last-named case was an application by the state of Missouri to the Supreme Court for an injunction restraining the state of Illinois from permitting the city of Chicago to empty its sewage into the Mississippi river. In dismissing the bill the court holds that if the alleged facts as to such pollution are not fully proved, and it also appears that such pollution might result from the discharge of sewage by cities of the complainant state into the same river, the bill should be dismissed.

It is no defense, however, that the nuisance complained of is

contributed to by the acts of others over whom the defendant has no control, if there should be a nuisance without such contribution. State *v.* Holman, 104 N. C. 861, 10 S. E. 758.

Bill of exceptions No. 1 is to the action of the court in giving an instruction for the plaintiff which told the jury, among other things, that if they believed, beyond a reasonable doubt, that the dam in question, for two or three miles above, produced such conditions as caused the people passing to and fro along the public highways in the neighborhood of said creek, dam, and mill to become affected with and have malarial diseases, such as chills, fevers, and diseases of a like nature, then they must find for the commonwealth.

This instruction is erroneous, for the reason that there is no evidence in the record tending to show that the health of any one traveling on the public highways was affected by the conditions alleged to have been caused by the existence of the dam. No effort seems to have been made by the commonwealth to show that the public on the highways suffered from the conditions complained of. The evidence for the commonwealth was limited to the effect upon the health of persons living in the neighborhood. This court has repeatedly held that instructions must be based upon evidence, and that it is error to give instructions not warranted by the evidence. Va., etc., Co. *v.* Harris, 103 Va. 708, 717, 49 S. E. 991; Rocky Mt. Trust Co. *v.* Price, 103 Va. 298, 49 S. E. 73.

Bill of exceptions No. 2 is to the action of the court in refusing to give the following instruction asked for by the defendant: "The court further instructs the jury that a milldam lawfully established is not prima facie a nuisance."

This instruction should have been given. There are structures as to which the law does raise a prima facie presumption that they are nuisances, and thus places upon those responsible the burden of showing to the contrary; but such is not the case with a milldam lawfully established.

Section 3868, Va. Code 1904, in defining what obstructions in a water course shall be deemed a nuisance, expressly excepts a dam used to "work a mill, manufactory, or other machine or engine useful to the public, and is allowed by law or order of court."

The defendant was, therefore, entitled to have the jury told that the mere maintenance of a dam upon its property, erected in accordance with law, created no presumption against it, and no burden to be overcome by it. Proof of the existence of such a dam did not relieve the commonwealth of the obligation to show a nuisance in fact.

Passing over other assignments of error not likely to arise on another trial, or practically disposed of in dealing with other

questions, we now come to consider whether or not the evidence supports the verdict.

The presentment charges that, on account of the conditions created by the dam, "the air became corrupted and infected, causing malignant fevers, chills, and other loathsome diseases," resulting, as alleged, in injury, etc. It is not claimed that the alleged accumulation of stagnant water along the stream produces disagreeable smells, or is otherwise offensive to the senses; but the single ground of complaint is a dissemination of the diseases named, by a corruption of the air. It appears from the expert evidence introduced on behalf of the commonwealth that this is not a fact. On the contrary, it is shown that the pollution of the atmosphere has nothing to do with the generation of the diseases mentioned, but that according to the universally accepted theory such diseases are due to the bite of the mosquito, which inoculates the victim with a poison carried in its system. This was not alleged in the presentment, and the presence of the poisonous mosquito in the locality seems to rest upon the presumption arising from the expert statement that stagnant water generally breeds mosquitoes. As already seen, the evidence fails to show that any highway or other thing of special public interest is affected by the alleged nuisance. The only claim in this connection is as to the two public roads and our state institution, all more or less remote from the dam. The evidence is silent as to how the public comfort and convenience are affected in the use of these public utilities.

The greatest difficulty, however, in the way of sustaining the judgment complained of, is that the evidence fails to show that the dam is the direct and proximate cause of the alleged nuisance, or that it is responsible for the conditions which, it is charged, produced the nuisance complained of. As already stated, there is no stagnant water in the stream itself; but the trouble arises, it is said, from the nearby stagnant pools of water that exist throughout the course of the stream. These pools are formed for the most part in what was once the bed of the creek, left when the channel of the stream was changed many years ago. The dam cannot be charged with responsibility for this condition. Even if the dam alone were the cause of the frequent overflows, which is not established, it is not responsible for the low places that collect and permit the stagnation of the water. These conditions can be as easily, if not more readily, accounted for by the numerous other obstructions shown to be in the stream as by the dam.

We are of opinion that the evidence in this case, which has been very briefly reviewed, fails to show that the dam is the proximate cause of the diseases complained of, or that it, and not other facts and conditions, is responsible for the alleged

nuisance which the commonwealth has sought to abate. It requires very clear and convincing proof to sustain a prosecution like this, where the result is to destroy valuable rights and property held, as this is, under specific authority of law. In a number of cases, and of a class not requiring the degree of proof that is essential here, this court has said that the evidence must show more than a probability of liability; and, if it is as consistent with exemption as with responsibility, or, as otherwise stated, if there is more than one cause to which an alleged ground of complaint may be due, and it is just as probable that one is as chargeable as the other, in either case the party sought to be charged must be relieved. N. & W. Ry. Co. *v.* Pool, 100 Va. 148, 40 S. E. 627; Consumers' Brewing Co. *v.* Doyle, 102 Va. 399, 46 S. E. 390. This doctrine is particularly pertinent to the facts of this case.

For these reasons, the judgment of the circuit court must be reversed, the verdict of the jury set aside, and the case remanded for a new trial not in conflict with this opinion.

Note.

It is well settled by repeated decisions of our court that where one of the counts in a declaration is in case for a tort, and another in assumpsit, a general demurrer to the declaration for such misjoinder ought to be sustained. Creel *v.* Brown, 1 Rob. 265; Southern Express Co. *v.* McVeigh, 20 Gratt. 264; Harvey *v.* Skipwith, 16 Gratt. 393; Gary *v.* Abingdon Pub. Co., 94 Va. 775, 27 S. E. 595; Booker *v.* Donohoe, 95 Va. 361, 28 S. E. 584.

Where the action is really in assumpsit, and there are three counts, the last two being in assumpsit, the mere fact that the first count says, "The plaintiffs complain of the defendant of a plea of trespass on the case," instead of "trespass on the case in assumpsit," cannot change the form of the action, nor affect the result upon demurrer for misjoinder of counts. Gray *v.* Kemp, 88 Va. 201, 16 S. E. 225, citing Kennaird *v.* Jones, 9 Gratt. 183.

Ejection of Passenger.—An action against a carrier for ejecting a passenger is an action ex contractu, based on the breach of the contract to convey the passenger. Boster *v.* Chesapeake, etc., Ry. Co., 36 W. Va. 318, 15 S. E. 158.

Intrusion into Office.—A count which simply sets out the details of an intrusion into an office, and claims of a de facto officer the emoluments of an office which have been illegally collected by him, and avers an indebitatus assumpsit to the de jure officer, cannot be said to be a count in tort. Booker *v.* Donohoe, 95 Va. 359, 28 S. E. 584.

Cure by Verdict.—If to a declaration charging a tort, with an assumpsit upon it, the defendant pleads not guilty, it will be good after verdict, notwithstanding the double aspect of the declaration, and the irrelevancy of the issue to the assumpsit. King *v.* M'Daniel, 4 Call 451.

How Objection Raised.—Such misjoinder makes the declaration bad on demurrer. But unless a demurrer has been filed and overruled, such misjoinder will not be ground for motion in arrest of judgment or writ of error. Norfolk, etc., R. Co. *v.* Wysor, 82 Va. 250.